BANK NEGARA MALAYSIA

v.

THE CO-OPERATIVE CENTRAL BANK LTD. AND THE JAFFNESE CO-OPERATIVE SOCIETY LTD. & 7 ORS. (INTERVENORS)

HIGH COURT, KUALA LUMPUR
DATO' HJ. ABU MANSOR BIN ALI J.
[ORIGINATING SUMMONS NO. R8-25-12 OF 1989]
13 AUGUST 1992

RECEIVERS & MANAGERS: Receivers and managers appointed by Court - Application for leave to sue receivers and managers - Discretion of Court - Discretion to be exercised judicially - Receivers and managers appointed under special law - Essential (Protection of Depositors) Regulations 1986 - Whether common law principles relating to liability of receivers and managers can be applied to receivers appointed under special law - Difference between Court appointed receivers and ordinary free receivers - Whether applicant should be granted leave to sue on its claim.

Tuan Haji Zainal Abidin Putih and Tuan Haji Ahmad Kamal bin Abdullah Al-Yaffii were both appointed the receivers and managers of CCB pursuant to an order of the Court of 7 March 1989, with powers *inter alia,* to manage the business of CCB, to close or cease its business and to assume the powers of the directors of CCB.

The appointment of the receivers and managers was on the application by Bank Negara Malaysia pursuant to a special law, in the form of the 1986 Regulations.

By a notice of motion dated 17 September 1991 Koperasi Pasaraya Malaysia or Malaysian Co-operative Supermarkets Society Ltd. sought the leave of the Court to sue the two receivers and managers of CCB for the sum of RM1,362,433.39 being the monies deposited by Koperasi Pasaraya Malaysia Bhd. in a savings account with CCB and interest on the said deposit which the receivers and managers had caused to be frozen following an order of the Supreme Court made on 25 May 1990, ranking all creditors of CCB, (including the depositors), *pari passu.*

Held:

[1] To apply the ordinary law liability of the receivers to the present facts of the case would be disregarding or overlooking or sweeping under the carpet the sum total of all that had transpired in the well-known CCB affair.

[2] It is too clear to be disputed that the receivers appointed by the Court could not be said to be exercising or performing functions of ordinary free receivers.

[3] To grant leave to the applicant to bring suits against the receivers would be to shut the eyes to the obvious that they were appointed to do the rescue work.

[4] As, in any rescue work the interest of any individual must be subordinated to the interest and common good of all and the granting of the leave to sue the receivers and managers would be detrimental to the ultimate good of all those intended to be protected by the 1986 Regulations.

[5] The granting of leave to sue the receivers and managers is a discretionary matter, which must be exercised judicially.

[6] As the granting of leave would be a step backward on what is attempted to be achieved by the 1986 Regulations, and would result in the refusal of many would be receivers from acting as receivers it would be unjust in the circumstances to grant leave.

[Leave refused. Costs to respondent].

Cases referred to:

Moss Steamship Company, Limited v. Whinney [1912] AC 254 ***(cit)***

Wong Pot Heng & Anor. v. Zainal Abidin Putih & Anor. [1990] 2 CLJ 174 / [1990] 2 MLJ 410 at 413 ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 11

For Bank Negara Malaysia - Zaki Tun Azmi (Benjamin Yean and S. Thomas with him); M/s. Rashid & Lee

For the Receivers of CCB - N. Chandran (P. Jayasingam with him); M/s. Adnan Sundra & Low

For Hj. Rosli bin Haji Kamaruddin and Wong Pot Heng- V.K. Lingam (Adam Bachek with him); M/s. V.K. Lingam & Co.

For CCB Executive Union - P. Kuppusamy; M/s. P. Kuppusamy & Co.

For the 1st and 2nd Intervenors - Vinayaga Raj Rajaratnam; M/s. Skrine & Co.

For (1) Malaysian Co-operative Supermarkets Society Ltd. (2) Railway Co-operative Thrift & Loan Society Ltd. (3) Railway Co-operative Multi-purpose Society Ltd. (4) Co-operative Union of Malaysia - A. Kanesalingam; M/s. Kanesalingam & Co.

JUDGMENT

Hj. Abu Mansor bin Ali J:

In this notice of motion enclosure (3) dated 17 September 1991 the applicant applied for the following orders:

> That Koperasi Pasaraya Malaysia Bhd. be granted leave to sue the receivers, Tuan Haji Zainal Abidin Putih and Tuan Haji Ahmad Kamal bin Abdullah Al-Yafii to claim RM1,362,433.39, as on 30 June 1990, together with interest thereon at 8% per annum, thereafter and costs and for a further order that the Koperasi Pasaraya Malaysia Bhd. (Malaysian Co-operative Supermarkets Society Ltd.) be named as an intervenor in these proceedings, on the grounds stated in the affidavit of Wong Kong Meng affirmed on 16 September 1991 and filed herein.

The applicant's application is supported by the affidavit of Wong Kong Meng, enclosure (2), an accountant employed by the Malaysian Co-operative Supermarkets Society Ltd.

Mr. Kanesalingam said that his client Koperasi Pasaraya Malaysia Bhd. or Malaysian Co-operative Supermarkets Society Ltd., has made several money deposits in a savings account, at the Co-operative Central Bank Ltd. and has been so operating the savings account for many years. The total deposit was as on 28 May 1990 - RM1,353,539.95. Bank Negara Malaysia then applied to appoint receivers, for the Co-operative Central Bank Ltd. Applicant society then withdraw all its deposits in the said savings account, leaving a balance of only RM5,240.59 as on 28 February 1989. On 7 March 1989, Tuan Hj. Zainal Abidin Putih and Tuan Hj. Ahmad Kamal bin Abdullah Al Yafii were appointed Receivers to manage the affairs and properties of the Co-operative Central Bank Ltd. On or about October/ November 1989 the two receivers or their agents published widely that they would carry on the business of the Co-operative Central Bank Ltd. and assured the public that all deposits placed would be secured. As a result of the assurance given by the receivers the applicant began to make deposits of large sums of monies with the receivers. As per exhibit "WKM-2" as of 31 May 1990 the amount plus interest is RM1,357,968.84.

The receivers of the Co-operative Central Bank Ltd. announced at the end of May 1990 that they were freezing all the business of the Co-operative Central Bank Ltd. The applicant then stopped making deposits. On 28 June 1991 the applicant then claimed for the refund of their deposits. The reply of the receivers, exhibit "WKM-5", dated 29 July 1991 say that all deposit accounts had been frozen following the Supreme Court's *pari passu* ruling for all creditors and depositors on 25 May 1990, pending further rulings of the High Court or the matter.

Counsel for applicant submitted that the applicant has a good claim against the receivers for the sum of RM1,362,433.39 as at 30 June 1990 with 8% interest under s. 11 of the Civil Law Act 1956 and costs.

Counsel for the applicant cited various authorities - *Moss Steamship Company, Limited v. Whinney* [1912] AC 254 (P4) which decided that receivers are personally liable for the debt incurred in carrying out business. Further they are also contractually liable. He submitted further that the authorities are overwhelming that they are liable when, after appointment, he receives money. He submitted that they have to pay on demand of the applicant. He submitted therefore that the applicant had shown *prima facie* case to obtain leave.

Mr. Chandran for the receivers on the other hand submitted that it is not disputed that the applicant are depositors. What is also not disputed is that the Co-operative Central Bank Ltd. has been to Court since 1989. This is stated in the affidavit of the Court appointed receivers Hj. Zainal Abidin Putih and Tuan Hj. Ahmad Kamal bin Abdullah Al Yafii enclosure (5). They were appointed receivers on 7 March 1989 with powers, amongst others, to manage the business of the Co-operative Central Bank Ltd. to close or cease its business and assume the powers of the Co-operative Central Bank Ltd.'s directors.

Mr. Chandran submitted that when we deal with the receivers of the Co-operative Central Bank Ltd., it must be recognised that they are receivers by virtue of an order of Court dated 7 March 1989 - that their appointment was pursuant to a special law, in the form of the Essential (Protection of Depositors) Regulations 1986. The appointment of the receivers were as a result of Bank Negara's application before Dato' Eusoff Chin J. (as he then was). Counsel submitted that the strict common law principles governing the appointment of receivers may have been varied either by the provisions of 1986 Regulations and/or the Court order

dated 7 March 1989 in the light of the expressed pronouncement of their Lordships in the Co-operative Central Bank Ltd.'s case before the Supreme Court.

Having been so appointed in accordance with the Court order, the receivers started functioning pursuant to the appointment and subsequently in the capacity of persons who had stepped into the shoes of directors of the Co-operative Central Bank Ltd. Counsel further submitted that whatever the receivers did they did so within the scope of their appointment - there therefore cannot be the question of personal liability on taking the appointment.

I find merit in the argument of Mr. Chandran, to apply the ordinary common law liability of the receivers to the present facts of the case would, in my view, be disregarding or overlooking or sweeping under the carpet the sum total of all that had transpired in the well-known CCB affair.

It is too clear to be disputed that the receivers that were appointed by the Court could not be said to be exercising or performing functions of ordinary free receivers. They work and perform their task, subject to and under the directions of the Central Bank or Bank Negara which has been given the massive task of carrying out a 'rescue operation', so to speak, with the long distance objective of protecting the interest of all depositors, not just the applicant. With respect, I now cite the judgment of their Lordships of the Supreme Court in *Wong Pot Heng & Anor. v. Zainal Abidin Putih & Anor.* [1990] 2 MLJ 410 at 413, to glean into the work of receivers so appointed:

> We shall now consider the relevant provisions of the 1986 Regulations. Under reg. 9(1), where the Central Bank, that is, Bank Negara, is satisfied that a body like the CCB is a deposit-taker, it may do one or more of the following for the protection of the depositors:
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> (a) require the deposit-taker to forthwith cease all or any transaction or activities relating to its business, and refund all moneys paid by any depositor in such manner as the Central Bank may direct;
> (b) assume control of and carry on the whole or any part of the business of the deposit-taker as the Central Bank deems fit, or appoint any person to do so on the Central Bank's behalf;
> (c) apply to the High Court to appoint a receiver to manage the affairs and property of the deposit-taker and for such incidental or ancillary orders or directions in relation to such appointment as may, in the opinion of the Central Bank, be necessary or expedient;
> (d) in the case of a corporation, present a petition to the High Court for the winding up of the corporation, and the Court shall accordingly have the power to make an order for the winding up of the corporation, notwithstanding anything contained in the Companies Act 1965;
> (e) in the case of a co-operative society, require the Registrar-General of Co-operative Societies to make an order for the cancellation of the registration of the co-operative society, and the Registrar-General shall accordingly cancel the registration of the co-operative society and shall have the power to do so upon being so required notwithstanding anything contained in the Co-operative Societies Act 1948; or
> (f) in the case of a pawnbroker, direct any licensing officer appointed under subsection (2) of s. 10 of the Pawnbrokers Act 1972 to cancel the licence granted under the Act to the pawnbroker, and such licensing officer shall accordingly cancel the licence and shall have the power to do so on being so directed notwithstanding anything contained in that Act.
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> But by virtue of reg 9 (2) because the CCB is registered as a co-operative society with limited liability under the Co-operative Societies Act 1948, Bank Negara cannot exercise any of the powers conferred under reg 9 (1) unless it is satisfied that the CCB is unable or is likely to become unable to meet its deposit liability to any extent . Thus in relation to a co-operative society, depending on the state of insolvency of the deposit-taker at the relevant time and other considerations that Bank Negara may deem necessary to take into account, the choice of actions that it finally takes under the provisions of reg 9 (1) would in our view reflect the type of salvage operation and consequently the extent or degree of protection that it intends to confer on the depositors.
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> For total or complete protection of the depositors in relation to a co-operative society, Bank Negara would in our opinion be expected to act under para (a) which would ensure the refund of all moneys paid by the depositors, or under para (b) by assuming direct control of the deposit-taker and pursuant to regs. 9(3)(a) either by itself or its appointees, carrying on the whole or any part of the

business of the deposit-taker until such time as:

(i) the deposit liabilities of the deposit-taker have been repaid or the Bank Negara is satisfied that suitable provision has been made for their repayment; or
(ii) Bank Negara is of the opinion that it is no longer necessary or expedient to do so.

In the case of the CCB, Bank Negara has deemed it necessary and expedient to apply to the High Court under para (c) of reg 9 (1) to appoint receivers to manage the affairs and property of the CCB, and to apply for incidental or ancillary orders or directions in relation to such appointment as contained in the court order of 7 March 1989 (see pp. 51 to 57 of the appeal record). We must not therefore confuse the application made to the High Court by Bank Negara and the subsequent application made to the same court by the receivers which has given rise to the dispute under appeal. The former, not the latter, would determine the degree and type of protection to be given to the depositors under reg 9. The distinction in our view is important so that the issue of protection of depositors can be distinguished from the issue at hand which is limited only to one of priority of payments between depositors and the two retrenched employees of the CCB in a situation in which Bank Negara has at the relevant time, elected to mount salvage operations under reg 9(1)(c).

I have after that to answer the question whether I should grant leave to the applicant to bring suits against the receivers as applied by the applicant. To do so would be to shut my eyes to the obvious that they were appointed to do the rescue work. In any rescue work, I am bound to say the interest of the individual, for the good of all, must be subordinated to the common good of all. I am of the view the granting of such leave would be detrimental to that ultimate good of all in which the Central Bank wishes to protect all depositors, as the 1986 Regulations had intended.

Leave as is well known is a discretionary matter which must be exercised judicially. Weighing carefully what is the effect of granting and refusing, I am clear in my mind the immediate effect of granting leave would be a step backward on what is attempted to be achieved by the Regulations. Granting leave would result in the refusal of many would be receivers from acting, as their protection is immediately lifted when they had, in truth performed acts subject to orders of the Central Bank by virtue of the 1986 Regulations. Considering all matters before me, I find it is unjust, in the circumstances to grant leave. Leave is therefore refused with the hope that time will correct itself and allow the applicant to have their monies refunded and in the meantime the applicant must therefore wait like everyone else. Leave is refused with costs to the respondent.